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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART IN

DANNY G. JONES,)	NIESE T
Petitioner,)	1-5 L
V .)	Docket No. 07-229 III
STATE OF TENNESSEE, DEPARTMENT OF TRANSPORTATION, TENNESSEE	<i>(</i>)	C. & M. CT.
CIVIL SERVICE COMMISSION, and ROBERT E. COOPER, JR., TENNESSEE	ĺ	
ATTORNEY GENERAL AND REPORTER	,)	
Respondent.))	@GOPY:

MEMORANDUM AND ORDER

This case is an appeal filed by a former supervisor of the Tennessee Department of

Transportation ("TDOT") pursuant to Tennessee Code Annotated § 4-5-322. Petitioner Danny G.

Jones is requesting that this Court reverse an order of the Civil Service Commission affirming

TDOT's decision to terminate his employment for alleged misconduct. In upholding the

termination, the Commission reversed an Initial Order by Administrative Law Judge Robert

Fellman, reinstating petitioner with back pay and benefits after serving a 15-day suspension.

After reviewing the record and considering the arguments of counsel, the Court finds that the Commission's decision was made upon unlawful procedure and shall be remanded to the Commission to reconsider the case in accordance with the Court's rulings and instructions stated herein.

The facts of record and conclusions of law on which the Court bases its decision and its instructions for remand are as follows.

Facts

In 1996, petitioner began working as a District 12 highway maintenance supervisor for TDOT. Shortly thereafter, petitioner began awarding himself and his employees unofficial compensation time for overtime hours, instead of pay as mandated by state policy. In other words, instead of being awarded monetary compensation for overtime, petitioner and his workers took time off from work. Petitioner testified that he did so at the direction of his then-supervisor Jim Salisbury. At around the same time, petitioner also began awarding himself and his workers more unofficial compensation time than was actually earned. For example, if petitioner or his employees worked an hour of overtime, they awarded themselves 1.5 to 2 hours of unofficial compensation time. This, according to petitioner, was also done at the direction of Mr. Salisbury and petitioner's subsequent supervisor, Roger Pounders. Mr. Pounders admitted approving the use of unofficial compensation time instead of overtime pay but denied giving approval to inflate the hours.² Petitioner also made it a practice to give himself unofficial compensation time for taking 15-minute work-related phone calls at home, visiting accident or road hazard scenes after hearing about them on a police scanner, and inspecting bridges when the threat level did not require it. Petitioner did this knowing that it violated the guidelines set out in the official TDOT human resources handbook.

Responding to a complaint about petitioner's alleged misconduct, TDOT began an internal investigation. The investigation confirmed that petitioner was using unofficial

Mr. Salisbury did not testify because he had passed away before the hearing.

²Mr. Pounders was not called as a witness at the hearing but made statements to an investigator during an internal investigation prior to petitioner's termination.

awarding himself and his workers hours over the time actually earned. The investigation also found that petitioner took time off from work without documenting it on either his time sheet or his unofficial compensation time sheet. The undocumented time totaled up to four hours and was taken in a three-day period. Petitioner admitted in two signed affidavits that he used and inflated unofficial compensation time but explained during his testimony that he worked the undocumented four hours after normal business hours.

In a letter dated October 2, 2003, petitioner was terminated for falsification of official documents relating to employment; willful abuse or misappropriation of state funds; negligence in the performance of his duties; and conduct unbecoming an employee in state service. The above-mentioned grounds for dismissal were based on the findings of the internal investigation.

Petitioner appealed his dismissal, claiming TDOT was treating him differently than other supervisors who received written warnings for similar conduct. TDOT, however, argued that petitioner's conduct was more egregious because he awarded himself and his employees more compensation time than actually earned while the other supervisors limited unofficial compensation time to hours actually worked. Following a hearing, Administrative Law Judge Robert Fellman ordered that petitioner be reinstated with three years of back pay and benefits after serving a 15-day suspension. In so ordering, Judge Fellman concluded that the termination was not justified because petitioner acted at the direction of two previous supervisors. He also concluded that petitioner's misconduct was no different than that of the other supervisors who were merely reprimanded. Judge Fellman found credible petitioner's testimony that he acted under the direction of his supervisors, primarily because TDOT offered no evidence to dispute

that. Additionally, he found that at least one supervisor in another county engaged in the same exact conduct as petitioner but was warned, not terminated. TDOT appealed the decision to the Civil Service Commission.

On October 31, 2006, the Commission reversed the initial order, concluding that termination was warranted because petitioner's conduct was more serious than that of the other supervisors since he claimed hours he did not work. In reaching this decision, the Commission found that petitioner's culpability was not reduced despite allegedly acting at the direction of his supervisors. The decision was made in the face of an instruction by the chairperson that the role of the Commission was to either affirm or reverse the administrative law judge and that the Commission's job did not include a middle ground punishment of reinstatement without back pay and/or benefits. This appeal followed.

Standard of Review

In reviewing the decision of an administrative agency or board, this Court does not sit as a trial court, and it does not consider the record de novo. CF Industries v. Tennessee Public Syc.

Comm'n, 599 S.W. 2d 536, 540 (Tenn. 1980). Instead, the Court's review is limited to the record and the grounds set out in Tennessee Code Annotated § 4-5-322(h). The statute states that:

The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decision are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

or

(5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record

TENN. CODE ANN. § 4-5-322(h) (2006). Under this section, the decision of the Commission must stand unless this Court finds that it violated one of the provisions listed above.

Decision Made Upon Unlawful Procedure

The Civil Service Commission is governed by several different statutes, rules, and regulations. The one at issue here is TENN. CODE ANN. § 8-30-328, which sets out the procedures and remedies for grievances. Under this statute, employees who hold permanent positions in civil service may request that a grievance be reviewed by the Commission. TENN. CODE ANN. § 8-30-328(a)(7). The statute states that "[W]hen the commission rules in favor of an appealing employee, it shall order the employee to be reinstated or made whole, or both, without loss of pay or benefits." TENN. CODE ANN. § 8-30-328(e). The Court's construction of this statute is that the Commission in reinstating an employee has the option of doing so with or without back pay and/or benefits. The Commission is not bound by the relief granted in prior proceedings. The Commission clearly has the option to grant one of the two remedies.

Based on the facts of this case and how the word was used by both the administrative law judge and the Commission, "reinstatement" would allow petitioner to return to his previous position as highway maintenance supervisor without receiving back pay. Whereas being "made whole" encompasses both reinstatement and back pay and/or benefits. Based on this, the Court

The Civil Service Commission is governed by Tennessee Code Annotated Title 8
Chapter 30, the Uniform Administrative Procedures Act, Tennessee Department of Personnel
Grievance rules, Chapter 1120-11, and the Tennessee Department of State's Uniform Rules of
Procedure for Hearing Contested Cases Before State Administrative Agencies, Chapter 1360-4-1.

The Court in this opinion uses the phrase "reinstatement with back pay" to mean "make whole" as used in the statute.

concludes that, if the Commission finds in petitioner's favor, it has the authority under the statute to either reinstate petitioner without pay or benefits or make him whole by reinstating him with pay and/or benefits. The statute does not contemplate limiting the Commission's relief to previous rulings.

Other statutory provisions also support the conclusion that the Commission is free to grant relief different from that in prior proceedings. TENN. CODE ANN. § 8-30-328(f) gives the Commission discretion in awarding attorneys fees and costs. Under the statute, this discretion is limited only by an established rate that must be applied in determining fees and costs. There is no requirement that the attorneys fees only be awarded if such an award was made prior to the last grievance step. Additionally, although not directly related, TENN. CODE ANN. § 4-5-315(i) requires the Commission to identify any differences between its order and the initial order. Section 4-5-315(i), therefore, clearly contemplates that the Commission, may, when it deems necessary, disagree with the initial order. One can reasonably conclude that this would extend to relief granted by the Commission.

Applying these rulings to the record, the Court finds that the Commission discussed at length whether it was permitted to reinstate an employee without back pay and/or benefits. At least two commissioners were interested in the possibility. One of the commissioners specifically asked TDOT attorney Kae Carpenter whether the Commission was required to reinstate with back pay:

Ms. Woodward-Thompson: Is there a requirement with the State that the person be made whole?

Ms. Carpenter: The statute says made whole, including being made whole. You put them back with certain remedies including being made whole. I don't think it contemplates that that always has to be the case, but it certainly would have to be

based on, again, if it's an alteration of the Administrative Judge's orders, that would have to be based on a finding of fact and conclusion of law as to why in this case this particular grievant was not entitled to what the Administrative Judge had ordered.

Tr. of Civil Service Commission Business Meeting, Vol. IV, 33-34:23-9, October 31, 2006.

In response to the commissioners' inquiries, Ms. Carpenter told the Commission that although the courts had not established a clear standard, the Commission likely had the authority to order reinstatement without back pay. Ms. Carpenter referenced a case on appeal where a commission reinstated an employee but did not grant back pay. The following exchange then occurred:

Mr. Hutcherson: "There was a case years ago ... it's up the Commission to determine the award of back pay and benefits ... but it's still within the discretion of the Commission to make an award of attorney fees and back pay and benefits."

Ms. Carpenter: "Oh. No question about that."

Id. at 35:6-14.

After Ms. Carpenter's reassurance that the Commission could likely order reinstatement without back pay, Chairperson Laura Holland gave an improper instruction to the Commission regarding the matter. Specifically, she stated that:

"I think my role on this Commission is to either uphold the decision of the departments or uphold the decision of the ALJ. I mean it's one or the other. I don't think my role is to tweak it somewhere in the middle because that just yet imparts one more solution to an already muddy problem anyway. So it would be, my leaning right now is to either uphold what the ALJ says, put the guy back, suspend him for fifteen days, pay him three years for the back pay or uphold his termination. And I don't, I personally don't want to impose yet another solution for this. I don't feel like that's my, that I am prepared to do that. You know. I just think that that's not my job."

Id. at 38-39:23-11

Following the chairperson's comments, discussion on modifying the decision of the administrative law judge, as opposed to reversing it, came to an end, indicating that the Commission accepted as correct the chairperson's position that the role of the Commission is to affirm in full either the state agency or the administrative law judge. Because the judge ordered reinstatement with full back pay and benefits, the Commission apparently felt that it had to either affirm the decision, thereby reinstating petitioner with back pay and benefits, or reverse it and terminate petitioner. This was incorrect. The Commission also had the option of modifying the judge's award to provide for reinstatement but not back pay or benefits. The Commission's role as the final arbiter of a grievance is not to rubberstamp the decision of either the state agency or the administrative law judge. Instead, its role is to review the previous proceedings and rulings to ensure fairness to the grievant. Based on its review, the Commission must decide whether to affirm a termination, reinstate the employee without back pay and/or benefits, or reinstate him with back pay and/or benefits. If, as the Commission apparently decided, the Commission's role is simply to rubberstamp the state agency or the administrative law judge, its review is pointless and the final step in the grievance process serves no meaningful purpose. The Court, therefore, concludes that the Commission's decision was made upon unlawful procedure because the Commission wrongly believed that it was required to affirm or deny in full the ruling of the administrative law judge such that the Commission did not fully analyze and did not make a decision on whether it should modify what the judge had done.

The other grounds on which the Court vacates the decision is that it was made upon unlawful procedure because the Commission considered evidence that the administrative law judge had previously decided was inadmissible. In his order, Judge Fellman specifically held that

allegations that petitioner improperly used sick leave and made up emergency situations in order to obtain additional compensation time could not be considered against petitioner in the hearing. Initial Order, Technical Record ("R") at 116-118. The judge's conclusion was based on the fact that neither allegation was referenced in petitioner's termination letter nor raised at any prior proceeding as grounds for termination 5 Id. Judge Fellman concluded that because petitioner did not receive notice of the allegations prior to the hearing, consideration of those allegations would violate his due process rights. Id. The judge limited the factual allegations against petitioner to the use and inflation of compensation time. R at 118.

In both its discussions and findings of facts, the Commission clearly considered the allegations. This is evidenced by the transcript. When discussing the differences between petitioner's actions and those of the other supervisors, the following exchange took place:

Ms. Woodward-Thompson: ... You know, when you look at No. 17, there were four other counties where this happened and they awarded the comp time on more than a one to one basis. But at least the people worked the time. They manipulated the time that they worked. But in this situation, he put in sick time when he wasn't really sick and hours that he really didn't work, and that's the difference."

Chair Holland: And he also lied about being called by the 9-1-1 people within his county and when they went to the 9-1-1 operators and said why do you call him so often, they said we don't call him that often. And then he had to go back and retract in writing, he said no, I told you that, but that really isn't what happened. He just doesn't have a lot of credibility.

The October 2, 2003, termination letter to petitioner states that he was being terminated because "pursuant to an investigation by Internal Audit, you have admitted that you claimed work hours on your time sheet when you had not worked, that you awarded yourself an hour of unofficial "comp time" when you spent approximately 15 minutes responding to calls after hours, that you awarded yourself and other employees 1.5 to 2 hours of unofficial "comp time" rather than cash overtime for overtime hours worked and that you approved employees to claim work hours on their time sheets when they were not at work." R at 22.

⁶ The Commission adopted TDOT's Proposed Findings of Fact.

Mr. Williams: That's a good point.

Ms. Woodward-Thompson: No. He doesn't.

Chair Holland: He was going to those calls and then claiming it was work time.

Ms. Woodward-Thompson: Uh-huh. That's right.

Chair Holland: Listened to the scanner and that's how he would get his calls to come in. You just really have to question the overall honesty of somebody who does that kind of thing and whether or not you want them leading your people.'

Tr. of Civil Service Commission Business Meeting, Vol. IV, 40-41:25-25, October 31, 2006.

This Court agrees with Judge Fellman's ruling that the evidence was inadmissible.

Petitioner did not have notice of those allegations and, therefore, was unable to defend against them. As Judge Fellman stated in his ruling, "Every litigant has a basic due process right to know the charges against him or her." R at 117. See McClellan v. Board of Regents, 921 S.W. 2d 684 (Tenn 1996). Additionally, TENN. CODE ANN. § 8-30-331 provides as follows:

- (a) Employees who have successfully completed their probationary period have a 'property right' to their positions. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular employee of such employee's property right will become effective until minimum due process is provided as outlined below.
 - (b) Minimum due process consists of the following:
- (1) The employee shall be notified of the charges. Such notification should be in writing and shall detail times, places, and other pertinent facts concerning the charges.8

Petitioner lacked notice of these allegations. His termination letter listed four specific allegations as the basis for his termination. The two allegations at issue were not among them.

Because petitioner lacked notice of the allegations, his due process rights would be violated if the

Cited by Judge Fellman in support of his conclusion that notice of the allegations against petitioner was required. R at 117.

⁸ TDOT Rule 1120-10-07 similarly requires that minimum due process be provided before an employee may be dismissed.

allegations could be considered in determining whether to terminate him. The Commission, therefore, should not have considered this evidence.

It is also important to note that the Commission did not address or state any reason why the evidence should be considered. As previously stated, TENN. CODE ANN. § 4-5-315(i) requires that the Commission identify any differences between its order and the initial order. If the Commission disagreed with the administrative law judge as to that ruling, it should have identified that in its order. The Commission did not do so

Based on the foregoing, it is clear that the Commission's decision was made upon unlawful procedure because it considered evidence that should not have been considered.

TENN. CODE ANN. 4-5-315 is Constitutional

This Court rejects petitioner's assertion that TENN. CODE ANN. 4-5-315, which governs the review of initial orders, is unconstitutional. The Court, therefore, denies petitioner's request that the Commission's ruling be reversed on grounds that the statute violates his due process rights.

Petitioner contends that the statute violates his due process rights under both the United States and Tennessee constitutions⁹ by allowing the Civil Service Commission to review and reverse the rulings of an administrative law judge, who, unlike the Commission, is learned in the law. Pet.r's Br. 5-6. In support of his argument, petitioner cites to City of Whitehouse v. Whitley, where the state Supreme Court held that due process guarantees to criminal defendants the right to be tried by an attorney judge when facing possible incarceration. 979 S.W. 2d 262, 267 (Tenn.

⁹ U.S. Constitution, XIV Amendment and Tennessee Constitution, Art. 1 § 8.

1998). The issue in that case was whether a municipal judge who was not an attorney could constitutionally preside over a trial involving criminal offenses punishable by incarceration.

Whitehouse, 979 S.W. 2d at 266.

This Court concludes that the holding in Whitehouse is not applicable to the case at hand for several reasons. First, Whitehouse involved a criminal proceeding, not a civil proceeding. Second, Whitehouse involved offenses punishable by incarceration. In other words, decisions made by the judge in that case could have had the effect of depriving the defendant of his liberty. That risk is not present in this case. Because of the risk of deprivation of liberty in criminal cases. the Supreme Court held that a judge must be learned in the law in order to preside over a criminal case involving possible jail time. The Court stated that "a criminal defendant has a constitutional right to representation by a legally qualified attorney. To require a lesser standard of a judge presiding over the trial of a criminal offense punishable by incarceration would defeat the constitutional purpose of the right to counsel." Id. at 267. Lastly and perhaps more important, the Court in Whitehouse specifically limited the case to judges presiding over criminal defendants facing possible incarceration. "By so stating, we do not hold that municipal or general sessions judges must be licensed attorneys to hold office or to exercise other duties and jurisdiction. Such judges may still function in civil cases and in criminal cases not involving potential incarceration . . . "Id. at 268 (emphasis added.) If a non-attorney judge can preside over other types of cases, including criminal cases that do not carry possible jail time, then, arguably, non-attorney members of a commission can adjudicate employment matters.

Petitioner is correct that he has a property interest in his job. ¹⁰ Because of that property interest, petitioner is entitled to minimum due process. As previously mentioned, minimum due process includes notice of the charges and other minimal protections. Minimum due process in this context does not include the same protections as in other contexts, such as criminal proceedings.

Petitioner received notice of the charges against him. As to the two allegations to which he did not receive notice, the administrative law judge and this Court both determined that the evidence was inadmissible. Also, the record shows that other requirements listed in the statute, such as giving petitioner the opportunity to meet with a manager before being terminated, were also met. Additionally, avenues of review are available to petitioner to ensure the process if fair. Petitioner has already availed himself of the opportunity to appeal the decision to this Court and has the right to appeal this Court's decision to the Court of Appeal and finally the Supreme Court. Safeguards, therefore, are in place to ensure that petitioner is not stripped of his property right without minimum due process.

It is, therefore, ORDERED that because the decision of the Civil Service Commission was made upon unlawful procedure, the Court vacates and remands the case to the Civil Service Commission with the instruction that in deciding the case, the Commission shall take into account that it has the option of reinstatement without back pay and/or benefits as well as termination or reinstatement with back pay and/or benefits. Additionally, it is ORDERED that

¹⁰ See previous discussion on TENN. CODE ANN. § 8-30-331.

the Commission shall not consider the evidence of petitioner's use of sick leave and alleged fabrication of work in order to claim unofficial compensation time.

Court costs are taxed equally between the parties.

Ellen Hobbs Lyle

Chancellor

cc: Douglas Jenkins John Dalton

RULE 58 CERTIFICATION

A Copy of this order has been served by U. S. Mail upon all parties or their counsel named above.

Deputy Clerk and Master Chancery Court

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(Cite as: 699 S.W.2d 808)

Reece v. Tennessee Civil Service Com'n Tenn.App.,1985.

Court of Appeals of Tennessee, Middle Section, at Nashville.

David REECE, Petitioner-Appellee,

V.

 $\begin{tabular}{ll} TENNESSEE CIVIL SERVICE COMMISSION, \\ Respondent-Appellant. \end{tabular}$

No. 85-117-II

Aug. 29, 1985. Application for Permission to AppealDenied by Supreme CourtOct. 28, 1985.

Employee was dismissed by State Civil Service Commission. Employee appealed. The Chancery Court, Davidson County, C. Allen High, Chancellor, reversed the decision of the Commission. Commission appealed. The Court of Appeals, Todd, P.J. (M.S.), held that evidence showed sufficient reason under statute regarding dismissal for good of the service, even though employee was discharged without proof of misconduct.

Reversed and remanded.

West Headnotes

[1] Administrative Law and Procedure 15A

15A Administrative Law and Procedure
15AV Judicial Review of Administrative
Decisions

15AV(A) In General 15Ak676 k. Record. Most Cited Cases

Administrative Law and Procedure 15A 791

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of 15Ak784 Fact Questions 15Ak791 k. Substantial Evidence. Most

Cited Cases

Administrative Law and Procedure 15A 793

15A Administrative Law and Procedure

<u>15AV</u> Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of 15Ak784 Fact Questions

15Ak793 k. Weight of Evidence. Most

Cited Cases

Trial court and reviewing court are required by provisions of Uniform Administrative Procedure Act to review findings of fact of administrative agency upon standard of substantial and material evidence and to consider entire record, including any part detracting from evidence supporting findings of agency, but may not review issues of fact de novo or substitute judgment of court for that of agency as to weight of evidence. T.C.A. §§ 4-523(g, h) (now § 4-5-322(g, h)), 4-524(now § 4-5-323).

[2] Prisons 310 5-7

310 Prisons

310k5 Officers and Employees

310k7 k. Appointment, Qualification, and Tenure. Most Cited Cases

Evidence showed sufficient reason under T.C.A. § 8-30-326 for dismissal of correctional officer at prison for good of service, even though employee was discharged without proof of misconduct regarding employee's arrest on charge of manufacturing marijuana, where employee's arrest received considerable public publicity through radio and news of arrest and charges against employee was readily available to inmates and employees.

Officers and Public Employees 283

283 Officers and Public Employees
 283I Appointment, Qualification, and Tenure
 283I(H) Proceedings for Removal,
 Suspension, or Other Discipline
 283I(H)3 Judicial Review
 283k72.49 Scope of Review

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(Cite as: 699 S.W.2d 808)

283k72.55 Questions of Law or Fact;

Findings

283k72.55(1) k. In General. Most

Cited Cases

(Formerly 283k72(2))

Court reviewing appeal from chancery court of dismissal of employee by State Civil Service Commission was not bound by supposed finding of chancellor that certain testimony was not substantial and material, where no question of credibility was involved before either court since there was no viva voce testimony in either court, and question before courts was question of law as to sufficiency of evidence presented to Commission and preserved in its record.

[4] Officers and Public Employees 283 69.7

283 Officers and Public Employees

283I Appointment, Qualification, and Tenure
 283I(G) Resignation, Suspension, or Removal
 283k69 Restrictions of Civil Service Laws
 and Rules as to Removals

283k69.7 k. Grounds for Removal. Most

Cited Cases

Public payroll cannot be made haven for those who with or without fault have become unable to perform duties for which they were employed, and "the good of the service" under T.C.A. § 8-30-326 regarding dismissals may in proper cases justify or require discharge of public employees when their efficiency or their usefulness in their positions has been seriously impaired by their own fault, by fault of others, or by blameless misfortune.

*809 William J. Marett, Jr., Woods, Woods & Watson, Nashville, for petitioner-appellee.
W.J. Michael Cody, Atty. Gen. and Reporter, Michael Lee Parsons, Asst. Atty. Gen., Nashville, for

OPINION

TODD, Presiding Judge, Middle Section.

respondent-appellant.

This is a judicial review of an administrative decision of the Tennessee Civil Service Commission which affirmed the dismissal of the plaintiff from his position as correctional sergeant at the Bledsoe Regional Prison, a facility of the Tennessee Department of Corrections.

On September 22, 1982, plaintiff was served by the Warden of the Bledsoe Prison with notice of termination stating the reason therefor as follows:

You were placed on indefinite suspension on August 12, 1982 due to your arrest and charge of "Manufacturing Marijuana". We were informed today by Attorney General William Pope that you were tried in Bledsoe County General Sessions Court and the court failed to exonerate you of the allegations. I feel that the nature and awareness of these charges would greatly affect your ability to perform the duties of a Correctional Sergeant. Because of this, I feel that I must terminate your employment.

On November 8, 1982, following a "grievance hearing", the Commissioner of Corrections affirmed the dismissal. On November 16, 1982, plaintiff appealed to the Civil Service Commission.

On November 16, 1983, one year later, a hearing was held before the Civil Service Commission which entered its order on December 2, 1983, affirming the dismissal. On petition for review, the Chancellor reversed, and the State appealed.

The sole issue stated by appellant is whether the decision of the Commission is supported by substantial and material evidence.

[1] The Trial Court and this Court on Appeal are required by the provisions of the Uniform Administrative Procedure Act to review the findings of fact of an administrative agency upon a standard of substantial and material evidence and to consider the entire record, including any part detracting from evidence supporting the findings of the agency, but may not review issues of fact de novo or substitute the judgment of the court for that of the agency as to the weight of the evidence. TCA §§ 4-523(g, h), 4-524. Humana of Tennessee v. Tennessee Health Facilities Commission, Et Al, Tenn.1977, 551 S.W.2d 664.

The gravamen of the grounds for dismissal was *not* that plaintiff was guilty of unlawful involvement with marijuana but that a prosecution had been duly initiated by police officers involving arrest of plaintiff on some charge involving marijuana, that this arrest received intensive publicity in the area of plaintiff's employment, and that the prosecution was terminated without exoneration of plaintiff, resulting in such impairment of his usefulness as required his discharge

(Cite as: 699 S.W.2d 808)

"for the good of the service".

At the hearing before the Commission, no effort was made by the State to prove guilt. The order of the Commission contains the following:

6. A level IV Grievance Hearing was conducted by Mr. Evans G. Fine, Director Offender Classification, on November 5, 1982. During the hearing, the petitioner admitted that marijuana was in fact growing on his property.

No evidence is found in this record to support the above finding which must therefore be disregarded.

Other findings of the Commission which are supported by substantial and material evidence are as follows:

- *810 (1) Prior to his separation from State service, Correctional Sergeant, David Reece, held a supervisory position at Bledsoe Regional Prison.
- (2) On August 12, 1982, Sergeant Reece was arrested at his home and charged with manufacturing marijuana. The arrest received extensive media coverage in the Bledsoe County area.
- (3) Sergeant Reece was placed on suspension pending an investigation of these charges.
- (4) On September 22, 1982, Mr. Reece entered into an Agreed Order pursuant to <u>TCA 40-15-102</u> et seq. (Pretrial Diversion). The agreement continued the case until November, 1982.
- (5) On September 22, 1982, Warden Livesay determined that the petitioner could not effectively perform the duties of a Correctional Officer and Supervisor because he was not exonerated of the allegations.

There is evidence that plaintiff was arrested at his home on a charge of "manufacturing marijuana", that the arrest, as well as the discovery of marijuana plants in proximity to plaintiff's home received considerable publicity through radio, TV and press media, all of which publicity was disseminated in the small County of Bledsoe and small community of Pikeville where plaintiff lived and worked. Although the arrest warrant is not in this record, other records of the General Sessions Court of Bledsoe County indicate that, on September 22, 1982, plaintiff appeared before the General Sessions Judge and signed a "Memorandum of Understanding" that he would not be tried on a charge of growing marijuana pending his participation in a Pre-Trial Diversion Program under TCA §

40-2105 et seq. and that the case was continued to November 1, 1982. There is further evidence that a charge against plaintiff of "Viol. of T.C.A. 52-1432(a)(1)(F) (Growing Marijuana)" was dismissed on September 22, 1982 and that plaintiff paid \$41.50 court costs on the same date. There is also evidence, that, on November 15, 1983, the Circuit Judge of Bledsoe County entered an order captioned "State of Tennessee vs. David Reece" reciting that: The Court having approved an agreed order on September 22, 1982, and the Defendant having complied with said order and more than ninety (90) days having lapsed since said order was entered, the parties hereby agree that the above styled case should

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above styled cause is hereby dismissed as shown by the Court records, and all public records allowable under <u>T.C.A. 40-15-106</u> are hereby expunged.

be dismissed as shown by the court records and

pursuant to T.C.A. § 40-15-106 all public records

allowable under said code section be expunged.

There is evidence that plaintiff was employed as correction sergeant, which position requires that he supervise an entire "shift" of security personnel and, in the absence of his lieutenant twice a week, to be in charge of the entire Bledsoe Regional Prison which has some 630 inmates, and 200 to 250 employees of whom 173 are security personnel.

There is evidence that the inmates have radios and television sets, that news of the arrest and charges against plaintiff was readily available to inmates and employees, and that:

[A]nybody that lives in Bledsoe County ought to know how gossip gets .. and if a man is innocent and doing his job, people can make it look like he ain't doing it.

There is also evidence that Bledsoe County is plaintiff's "home": that he was born there, lived a time in Chattanooga, spent some time in the armed services and returned to Bledsoe County.

There is also evidence from the warden of the facility that plaintiff's position was one of trust in many respects including attitude of inmates, attitude of subordinates, and trust from superiors not only in supervising security but in preventing *811 and reporting breaches of security including introduction

(Cite as: 699 S.W.2d 808)

of drugs into the institution. The warden stated that, even if a not guilty verdict had been rendered, something of a cloud would have remained over plaintiff such that his ability to supervise would have been impaired; and that the particular disposition of the prosecution left unanswered the question of guilt or innocence so as to destroy plaintiff's usefulness to the institution.

Plaintiff's brief asserts correctly that pre-trial diversion involves no acknowledgement of guilt. However, it is probable that uninformed members of the public regard the procedure as involving some admission of guilt. As stated above, plaintiff was not discharged because of acknowledgement of guilt.

Plaintiff's brief next asserts correctly that the record of the prosecution has been "expunged". However, there is no evidence that the termination of the prosecution under the circumstances or the "expungement of the record" was ever communicated to the public or had any effect whatsoever upon the image of plaintiff in the mind of the inmates and fellow employees of plaintiff.

Plaintiff's brief also asserts (erroneously) that the State insists that the failure of plaintiff to "exonerate himself" (by not guilty plea, trial and not guilty verdict) is evidence of guilt. This is not the theory of the State. The premise of the State, which is supported by the evidence and by common sense, is that whenever a public official is accused of wrongdoing, especially that which closely affects his public duties, his public image is marred because of a suspicion of guilt which is not allayed or removed without a conclusive determination of the fact of guilt or innocence. This is the position in which plaintiff, or any other public official finds himself once he has been charged, falsely or otherwise, and the charges have received the usual venomous publicity. For the superiors of such public employee, the issue is not guilt or innocence, but usefulness or uselessness.

Plaintiff next insists that the testimony of plaintiff's superior, the warden, was not "substantial evidence" that plaintiff's usefulness had been so impaired as to justify his termination. The warden's qualifications were impressive: Bachelor's and Master's degrees in sociology and psychology, counselor at Brushy Mountain Prison, counselor and later Warden of Knoxville Community Service Center, Warden of

Bledsoe Regional Prison for four years. The warden explained in detail the relation between unresolved "shadows" upon the integrity of a corrections officer and the response of others to his efforts to supervise. The reasoning of the warden is confirmed by the reasoning of an ordinarily prudent person, as represented by the membership of the Commission.

T.C.A. § 8-30-326 provides in pertinent part as follows:

Dismissal-An appointing authority may dismiss any regular employee in his division when he considers that the good of the service will be served thereby....

[2] Taken literally, the statute reads that it is sufficient that the superior "considers" that the good of the service will be served by dismissal. However, the clear and necessary import of the statute is that the superior must "consider" for *sufficient reason* that the good of the service will be served. Such sufficient reason is shown in the present case.

Plaintiff next complains that members of the Commission demonstrated their own inclination to approve the dismissal merely because plaintiff failed to exonerate himself. Whatever the motive of the questions asked by the commissioners, they were justified, either upon the testimony of the warden or upon the exercise of their common sense in concluding that plaintiff's usefulness had been seriously impaired by the unresolved public accusations against him and that the "good of the service would be served" by his termination.

[3] Plaintiff conceives that this Court is in some manner bound by the supposed finding of the Chancellor that the testimony of the warden was not "substantial and *812 material evidence". Such is not the law relating to this appeal. No finding of fact is involved, either in Chancery Court or in this Court. No question of credibility is involved before either Court, because there was no viva voce testimony in either Court. The question before the Chancery Court and upon appeal to this Court is a question of law as to the sufficiency of the evidence presented to the Commission and preserved in its record. The opinion in *Metro Govt. of Nashville, etc. v. Shacklett*, Tenn.1977, 554 S.W.2d 601, contains nothing contrary to the foregoing.

Plaintiff argues that, upon being expunged, the record

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of his arrest and subsequent proceedings ceased to exist for the purpose of this proceeding. This argument is not entirely consistent with the introduction of such records by plaintiff as part of his testimony. However, the existence or non existence of the records or the occurrence or non occurrence of the arrest are immaterial to this proceeding; for, as stated heretofore, the gravamen of the grounds of dismissal was the publicity accorded to the accusation and its effect upon usefulness of plaintiff in the particular public position held by him.

The diversion agreement is not the ground of discharge, although a refusal to sign it, insistence upon a trial and ultimate acquittal, if sufficiently publicized, would have mitigated the effect of the derogatory publicity. The signing of the order of dismissal on September 22, 1982, convinced plaintiff's superior that there would be no judicial mitigation of the effects of the derogatory publicity.

Plaintiff cites Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), wherein police officers were questioned by the Attorney General about irregularities in the performance of their duties after receiving a Miranda Warning. Some of the answers given were used as evidence in a criminal proceeding against the officers in which they were convicted. The Supreme Court reversed the convictions on the ground that the statements of defendants were coerced because the state statute provided that the officers would be subject to removal from office for failing to testify or pleading the 5th amendment. The cited authority is readily distinguishable from the present case in which no confession was obtained and no prosecution, evidentiary ruling or conviction is being reviewed.

The present case is a civil case involving discharge "for the good of the service" and not for the commission of any crime.

While not precisely in point, <u>Stone v. Commonwealth</u>, (Pa.Cmwlth.1980) 422 A.2d 1227, was a review of a civil service approval of dismissal of a prison guard for possession of marijuana at a state correctional institution. There was no statutory authorization for discharge "for the good of the service", but only for misconduct or "other substantial reasons". The employee was a guard and not a supervisor, the incident occurred at an institution rather than a home,

and guilt was apparently established. In affirming the dismissal, the Pennsylvania Court said:

In the instant case, appellant's possession of marijuana violated the parameters of the sensitive position which he held and cast doubt on his "competency and ability" to execute his duties, sufficient to warrant removal for cause. 422 A.2d at 1228.

In <u>Dept. of Justice v. Grant</u>, 22 Pa.Cmwlth. 582, 350 A.2d 878 (1976) a corrections officer was released from service upon being found in an automobile which was used in a robbery and which contained a stolen handgun. The Appellate Court affirmed and said:

The appellant in the case at bar was employed to guard prisoners in a state correctional facility; this is a highly sensitive position which requires those who would hold it to avoid even the appearance of impropriety. 350 A.2d at 880.

Diligent search has failed to disclose any published authority directly upon the issue *813 presented herein, namely, where the statute authorizes discharge "for the good of the service" may an employee be discharged without a finding of some misconduct on his own part and solely upon the basis of impairment or destruction of his usefulness by factors independent of his misconduct?

No authorities have been found which involve a statute or regulation containing the words, "for the good of the service" or their equivalent.

In <u>Nephew v. Wills</u>, 298 Mich. 187, 298 N.W. 376, 135 <u>A.L.R. 1340 (1941)</u>, a discharge was upheld where the employee married with knowledge of a rule which made marriage a ground for termination. The regulation in question provided for discharge "for any cause ... which, in the opinion of the person with authority ... may interfere with the efficient discharge of his duty".

In <u>Bradford v. Dept. of Hospitals</u>, 255 La. 888, 233 So.2d 553 (1970), it was held that after exhaustion of sick leave, the continued inability of an employee to perform his duties was legal cause for dismissal.

[4] It must be conceded that the public payroll cannot be made a haven for those who with or without fault have become unable to perform the duties for which they were employed. It must likewise be conceded that "the good of the service" may in proper cases justify

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or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

For example, could a prison be required to continue the employment of a lookout on the wall who had lost most of his eyesight in an accident not of his own making?

As another example, if a prison chaplain should be accused of an act of base immorality, and the accusation is widely publicized within and without the walls, should the chaplain expect to be retained simply because he is not criminally prosecuted?

Although unnecessary for the present decision, a strong argument can be made for the proposition that public employees whose reputation is vital to their usefulness have a duty to actively respond to any adverse publicity, particularly prosecution for crime, and to take reasonable steps to salvage and rehabilitate their reputation and usefulness. If this be a reasonable duty, then the failure to perform it may amount to a form of passive misconduct contributing to the disability which requires discharge.

The issues in this case are not without doubt, and are not easily resolved; witness one dissent on the Civil Service Commission and the decision of the Chancellor.

The determinative factor is which of two considerations predominate: (1) the right of the State to maintain an efficient, effective correction institution for the protection of the public, or (2) the right of the individual employee to retain his position until he has been proven guilty of misconduct. It is the view of this Court that the first consideration must prevail over the second.

In this view of the case arguments as to presumptions of innocence and burden of proof as to guilt become moot.

The members of this Court sympathize with any employee who may be discharged without proof of misconduct; but the interest of the public requires this sacrifice of public employees when their usefulness has been seriously impaired with or without fault.

The judgment of the Chancellor is reversed. The decision of the Civil Service Commission is affirmed. All costs, including costs of this appeal are taxed against the plaintiff. The cause is remanded to the Chancery Court for such further proceedings, if any, as may be necessary and proper.

Reversed and remanded.

LEWIS and CANTRELL, JJ., concur. Tenn.App.,1985. Reece v. Tennessee Civil Service Com'n 699 S.W.2d 808

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(Cite as: 833 S.W.2d 82)

Tennessee Dept. of Mental Health and Mental Retardation v. Allison Tenn. App., 1992.

Court of Appeals of **Tennessee**,Middle Section, at Nashville.

TENNESSEE DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION,

Petitioner-Appellant,

v.

Mary Annette **ALLISON**, Respondent-Appellee. Jan. 22, **1992**.

Application for Permission to AppealDenied by Supreme CourtMay 26, **1992**.

Employee challenged her discharge by Department of **Mental Health** and **Mental Retardation** pursuant to mandatory termination rule of Department. The Civil Service Commission reversed administrative order upholding discharge. The Chancery Court, Davidson County, C. Allen High, Chancellor, affirmed, and Department appealed. The Court of Appeals, <u>Lewis</u>, J., held that Commission had statutory authority to reverse decision of Department to discharge employee under regulation.

Affirmed.

West Headnotes

1 Officers and Public Employees 283 72.22

283 Officers and Public Employees

<u>283I</u> Appointment, Qualification, and Tenure

283I(H) Proceedings for Removal,

Suspension, or Other Discipline

283I(H)2 Administrative Review

283k72.21 Decisions Reviewable;

Forum for Review

283k72.22 k. In General; Adverse

Actions. Most Cited Cases

Civil Service Commission had statutory authority to reverse decision of Department of **Mental Health** and **Retardation** to discharge employee pursuant to its mandatory termination regulation for striking patient. T.C.A. §§ 8-30-328, 33-1-203.

[2] Administrative Law and Procedure 15A

15A Administrative Law and Procedure

<u>15AIV</u> Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak303 Powers in General

15Ak305 k. Statutory Basis and

Limitation. Most Cited Cases

Department or agency of state created by legislature cannot by adoption of rules be permitted to thwart will of legislature.

*83Robert A. O'Connell, Nashville, for petitioner-appellant.

Frank J. Scanlon, Watkins, McGugin, McNeilly & Rowan, Nashville, for respondent-appellee.

OPINION

LEWIS, Judge.

This is an appeal by the **Tennessee** Department of **Mental Health** and **Mental Retardation** (Department) from the judgment of the trial court affirming the **Tennessee** Civil Service Commission's (Commission) decision to reverse the Administrative Law Judge's (ALJ) initial order upholding the Department's termination of respondent. The Commission reduced the termination to a three-day suspension.

The facts as found by the ALJ which are undisturbed by the Commission and supported by the record are as follows:

- 1. The Grievant was an Habilitative Therapy Technician at Clover Bottom Developmental Center, ("Clover Bottom"), a facility operated by the Department, at the time of her termination. The Department stipulated that prior to her termination, effective May 19, 1989, the Grievant had been a model employee during her 9 1/2 year tenure with the Department. Her employment record consisted of superior performance evaluations and no disciplinary actions.
- 2. At the time of the incident in question, the Grievant was approximately 30 weeks pregnant.

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3. On May 1, 1989, the Grievant was working in a training room in the Community Preparation Program area of Habilitative Services. As she entered the training room she was told by one of the residents, B.B. (to protect the confidentiality of the resident's identity, the resident was referred to as "B.B." throughout the course of the hearing and will be so referred to in this Order), that she had been hit by another resident. B.B. became quite upset, physically aggressive, and loud. The Grievant tried to get B.B. to sit in a chair in an attempt to calm her down. The Grievant was behind B.B., holding her arms, attempting to guide her to a chair. B.B. was yelling and struggling to get free, and on two or three occasions struck the Grievant in the stomach with her elbow. When they reached the chair, B.B. picked it up and began banging it on the floor. This entire episode went on for a few minutes until B.B. again struck the Grievant in the stomach with an elbow. The Grievant, still behind B.B., then struck B.B. on the left side of her face with the back of her right hand.

- 4. The blow was witnessed by Charlene Smith, an Habilitative Therapist. Upon observing the Grievant strike B.B., Ms. Smith immediately reported the incident to Mary Hamblen, her supervisor. Ms. Hamblen and Ms. Smith then went to the training room where they observed B.B. seated at a table with her head on her arms on the table. Ms. Hamblen observed a red mark on the side of B.B.'s face.
- 5. B.B. is a 40-year old, severely retarded female. B.B. is, at times, a very difficult resident for the Clover Bottom staff to contend with. She can be loud, verbally abusive, and physically aggressive. She has a history of striking other residents and staff members.
 6. The Grievant admitted to striking B.B. She stated that she knew it was wrong, but she hit B.B. out of frustration and concern for her unborn child. The
- that she knew it was wrong, but she hit B.B. out of frustration and concern for her unborn child. The Grievant testified that she did not intend to hurt B.B., but was merely attempting to calm her down. She also stated that due to a staff shortage that day, there was no one in the area available to assist her.
- 7. At the time of the incident in question, Clover Bottom had in effect Policy No. 4.3.10.0, RESIDENT ABUSE/MISTREATMENT/NEGLECT. Section (I)(A)(1) provides that resident abuse occurs*84 when an employee "... actually touches (physical abuse) a resident in any manner which a reasonable person would recognize as likely to be harmful or painful or to cause mental anguish, ..." The Policy further states: If an employee engages in conduct prohibited by this section, the employee is guilty of resident abuse which is personal conduct unbecoming a State employee, and

the employee shall be dismissed. Such a violation is most likely to be determined to be gross misconduct within the meaning of the Rules and Regulations of the **Tennessee** Department of Personnel.

8. Also in effect at the time of the incident was Department of **Mental Health** and **Mental Retardation** Rule No. 0940-2-3-.03, RESIDENT OR PATIENT ABUSE BY EMPLOYEES. Subparagraph (a) provides that an employee shall not:

... actually touch a resident or patient in any manner which a reasonable person would recognize to be harmful or painful or to cause mental anguish, ...

The Rule further provides that:

If an employee engages in conduct prohibited by this rule, the employee is guilty of conduct against the good of the service, and the employee shall be dismissed. Such a violation is most likely to be determined to be gross misconduct.

Rule 0940-2-3-.02(2)(a) JUSTIFIED EMPLOYEE CONDUCT, provides that an employee who engages in conduct otherwise in violation of the Department's rules will not be subject to discipline if "the conduct is reasonably necessary to protect either the resident or patient or the employee or another person from harm, "

9. Dr. Catherine Terrell, Assistant Superintendent of Program Services at Clover Bottom, reviewed the matter and recommended that the Grievant be terminated. Dr. Terrell based her decision upon the seriousness of the incident and her understanding of the Department's interpretation of the Clover Bottom policy and the Department's rules that termination is required whenever an incident such as this occurs.

On 19 May 1989, respondent was terminated from employment by the Department. She subsequently filed a grievance with the Department. The hearings conducted at the third and fourth steps of the grievance procedure resulted in the upholding of her termination. On 8 September 1989, a fifth-step grievance hearing was held before an ALJ assigned by the Secretary of State to sit for the Tennessee Civil Service Commission in Nashville. On 22 September 1989, the ALJ found the facts set out above and concluded that respondent had violated Department Rule No. 0940-2-3-.03 and affirmed the Department's termination of her employment. On 27 October 1989, after her unsuccessful petition for a reconsideration of the ALJ order, respondent appealed the ALJ's order to the Commission.

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Without disturbing the ALJ's findings of fact, the Commission issued its own initial order overturning the ALJ's order, converted the respondent's termination into a three-day suspension, and awarded the respondent back pay. The Department petitioned the Commission for a reconsideration of its initial order. The petition was overruled and the initial order subsequently became final. The Department then filed its petition in the Chancery Court for Davidson County for review of the agency action. On 19 April 1991, the Chancellor heard the appeal. On 23 April 1991 the Chancellor entered a memorandum and order affirming the Commission's decision. The Department has appealed from the judgment of the Chancery Court.

[1] The Department has presented three issues which the respondent has succinctly stated as follows: "Whether or not the **Tennessee** Civil Service Commission has the statutory authority to reverse a decision of the **Tennessee** Department of **Mental Health** and **Retardation** to terminate a Department employee under circumstances which arguably mandate such termination pursuant to Department regulations."

*85 When the Department of Mental Health and Mental Retardation was established, the General Assembly delegated to the Commissioner of the Department the power and the duty to "[m]ake and adopt rules and regulations, ... for the government, management, and supervision of each and all state mental health facilities; prescribe the powers and duties of the officers and employees thereof; ... and provide for the care, maintenance and treatment of the patients and residents therein." Tenn.Code Ann. § 33-1-203. Pursuant to this Section, the Department promulgated Rule 0940-2-3-.03 pertaining to resident or patient abuse by employees. This Rule requires automatic dismissal of an employee who "knowingly threatens to touch, attempt to touch, or actually touch a resident or patient in any manner which a reasonable person would recognize as likely to be harmful or painful or cause mental anguish" Rule 0940-2-3-.03. Such a rule is a proper subject of judicial notice, Tennessee State Bd. of Education v. Cobb, 557 S.W.2d 276, 278 (Tenn. 1977), and has the force and effect of law. State ex rel. Chapdelaine v. Torrence, 532 S.W.2d 542, 547 (Tenn.1975).

The Department's primary, if not sole, argument is that the Department's Rule 0940-2-3-.03 precludes the Commission from overturning the Department's decision to terminate an employee. We respectfully disagree.

The General Assembly created the Civil Service Commission, gave it broad authority over the dismissal or disciplinary action of civil service employees, and provided a comprehensive and clear plan for employment, regulation, discipline and, if necessary, termination of civil service employees. Tenn.Code Ann. § 8-30-101, et seq.

<u>Tennessee Code Annotated, Section 8-30-328</u>, sets forth a grievance procedure for "regular employees" of the state. A "Regular employee" is "an employee who holds a civil service position of a permanent nature." Tenn.Code Ann. § 8-30-328(a)(2).

The general assembly vested the Civil Service Commission with the power and jurisdiction to have the final word regarding the discipline and termination of civil service employees. The Department's dismissal of a civil service employee is subject to the grievance procedure set forth in Tennessee Code Annotated, Section 8-30-328(a)(7), which provides: "The final step of this grievance procedure for regular employees shall be a request for review to the commission, and all decisions by the commission upon such requests for review *shall be final*. For all other employees the final step shall be the appointing authority." Tenn.Code Ann. § 8-30-328(a)(7) (emphasis added).

Tennessee Code Annotated, Section 8-30-328(e) provides: "When the commission rules in favor of an appealing employee, it shall order the employee to be reinstated or made whole, or both, without loss of pay or benefits." This statute does not contain any limitations on the Commission's authority to reverse termination of regular employees. There is also no limitation on the type or nature of the grievance a "regular employee" may bring to the Commission. Tenn.Code Ann. § 8-30-328(e).

If the Department is correct, and it cites no rule of law in support of its argument, then the intent of the legislature in creating the Civil Service Commission and giving it authority over discipline and/or dismissal of civil service employees can be thwarted by any

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department of the State of Tennessee simply by adopting a rule such as the one adopted by the Department in this instance.

[2] A department or agency of the State created by the legislature cannot by the adoption of rules be permitted to thwart the will of the legislature. The legislature is elected by the citizens of Tennessee and as an elected body it speaks for the people on matters of public policy of the state. Unelected officers of a department or agency cannot adopt rules to circumvent statutes passed by the legislature. The powers to make the laws of the state are vested in the general assembly and not in administrative agencies of the state, even when the administrative agency properly promulgates rules and regulations.

*86 The Department makes three arguments: 1) that its mandatory dismissal rule was duly promulgated and therefore should be given deference by the commission, 2) the commission's decision had the effect of illegally suspending the Department's Rule, and 3) because the commission allegedly exceeded its authority, its action is a nullity and should be reversed.

The Department assumes that the Commission's decision and the Department's Rule are mutually exclusive as a matter of law. It is the Department's insistence that upholding the Commission's decision nullified a duly promulgated regulation of the Department and conversely upholding the validity of the regulation requires nullification of the Commission's decision.

We find nothing to prevent the Department from having a valid mandatory dismissal regulation subject to review by the Commission should the aggrieved employee elect to follow the grievance route. We are of the opinion that upholding the Commission's decision in no way voids the regulation or prevents the Department from terminating its employees thereunder in the future. Where the regulation may be involved, some employees may not be entitled to a Commission review, others may not seek such a review, and some that do seek review may be unsuccessful in obtaining reinstatement.

We are of the opinion that the respective statutory duties of the Commission and the Department are easily harmonized and the underlying legislative intent with respect to those duties is not disturbed. *See*,

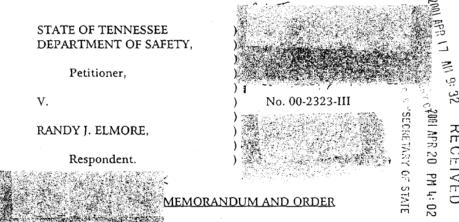
e.g., <u>Tennessee Manufactured Housing Assoc. v.</u> <u>Metropolitan Government of Nashville, 798 S.W.2d</u> 254 (Tenn.App.1990).

The judgment of the Chancellor in affirming the Commission's initial order is affirmed with costs assessed to the appellant and the cause remanded to the Chancery Court for the collection of costs and any further necessary proceedings.

TODD, P.J., and CANTRELL, J., concur. Tenn.App.,1992. Tennessee Dept. of Mental Health and Mental Retardation v. Allison 833 S.W.2d 82

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE 20TH JUDICIAL DISTRICT, DAVIDSON COUNTY



Petitioner, the Tennessee Department of Safety ("the Department") seeks judicial review of a decision by the Tennessee State Civil Service Commission ("the Commission") declining to uphold the Department's termination of Randy Elmore ("Elmore") and instead imposing upon him a 90-day suspension without pay and a 90-day probation period, awarding him back pay, benefits and attorney's fees, and ordering that he be assigned to his original work district, with the exclusion of Cumberland County, Tennessee.

SUMMARY OF FACTS

This Court relies upon many of the findings of fact by the Administrative

Law Judge ("ALJ") to explain the detailed history of this proceeding.

- 1. Elmore has been a criminal investigator with the Criminal Investigation Division of the Tennessee Highway Patrol for over 21 years. He is a resident of Cumberland County, but assigned to work in Fentress, Overton, Clay and Pickett Counties. He received exceptional ratings from his supervisors for the nine years prior to the incident in question.
- 2. On Sunday, June 7, 1998, Elmore and his friend Jim Hale were riding a "four wheeler" on Smith Mountain in Cumberland County, Tennessee. At approximately 11:00 a.m., Elmore and Hale arrived at some coal mine property near a

security guard trailer. Elmore was drinking beer and Hale, liquor.

- 3. Shortly thereafter, Kendall Smith, Jeff Burnett, and Sheila Griffin (Burnett's girlfriend) arrived at the coal mine property in Burnett's pickup truck. The various people involved all knew each other. The three emerged from the pickup truck and acknowledged the other two men. When Kendall Smith (who married Elmore's first cousin) offered to shake Elmore's hand, Elmore refused, turned around and left the immediate area. Smith's marital problems had caused his wife to upset Elmore's mother, who has serious heart problems. Evidently, Elmore had bad feelings towards Smith.
- 4. Next, Smith left the coal mine with the couple and they went to get more beer, which they had been drinking. Elmore and Hale left to go "four wheeling" and shooting on the mountain. Throughout the day, Elmore testified that he had had about five beers. From the record, Kendall Smith had somewhat more than that. Both Elmore and Smith had pistols in their possession that day.
- 5. At about 4:00 p.m., Smith left Burnett and Griffin and drove down the mountain alone in his diesel pickup. At a curve in the road, he met Hale coming the other way on his four-wheeler, with Elmore riding on the back. Both Smith and Hale stopped. Elmore got off the four-wheeler, placing his revolver in the milk carton in the front of the four wheeler. Hale drove the four-wheeler around to the back of the truck. Hale then stopped and locked down the four wheeler to keep it from rolling.
- 6. With the two vehicles stopped, words were exchanged between Elmore and Smith. Smith testified that he asked how they were doing. Elmore testified that Smith confronted him (Elmore) as to "who he had been talking to" and pulled a weapon.
- 7. The ALJ heard each party's version of the dispute that followed. Smith testified that Elmore attacked him, the two exchanged blows, that he (Smith) reached for the pistol he kept loaded in the truck, and that in a struggle over the pistol, the gun went off and a bullet struck Smith in the arm. Elmore testified that Smith went

for his pistol at the very first, and that the struggle began over the pistol. Both agreed that Smith went for the gun, and that it was in his hand when it went off in a struggle over the gun. Hale, the only other person in the vicinity, testified he saw nothing of the start of the struggle and had little to add of importance.

- 8. After Smith was shot, the fight stopped. Hale offered to drive Smith to the hospital. Smith refused, saying he would drive himself to the hospital. On his way to the hospital and upon his arrival there, Smith told various people that he had accidentally shot himself. Later, the story about the fight was told to law enforcement.
- 9. Elmore was charged with reckless aggravated assault and found guilty by a jury of simple assault. The jury declined to impose a fine. That verdict was appealed, and has not become final.
- 10. Two days thereafter, on June 9, 1998, Elmore was placed on administrative leave with pay. On July 2, 1998, his status was changed to leave without pay, with the concurrence of the Commissioner of Personnel. He received a post-suspension hearing on July 22, 1998, which continued his leave without pay. He was terminated effective September 13, 1998, after a due process hearing on August 28, 1998, for gross misconduct or conduct unbecoming a state employee, participation in an action that would in any way seriously disrupt or disturb the normal operation of the agency, and acts that endanger the lives of others (other internal rules were also cited which largely repeat these official rules).
- 11. On or about June 11, 1998, Kendall Smith's wife received a letter and a check from Elmore. The check was for \$2,000.00 and bore the notation "medical expenses." The letter stated in part: "I'm sorry for what happened between Kendall and I. Sometimes things occur that you try to control but happens anyway. In the past years, I've had to deal with a lot of personal problems along with job problems and I have tried to run away or not say anything because sometimes words are said that can't be taken back. . . The mountain has been a refuge for me to get away from problems,

but it turned out to be the problem."

- 12. Elmore occupied a position of high public visibility and trust. His credibility and reputation are important to his ability to carry out his duties.
- 13. The shooting incident involving Elmore received considerable publicity through radio and newspaper media in the Cumberland County community. According to Elmore's supervisor, this publicity would compromise his ability to work in Cumberland County, but not in other locations.
- 14. The Department of Safety introduced no evidence that would show that this incident seriously disrupted, or even disrupted at all, the functioning of the Criminal Investigation Division or the Department.

STATEMENT OF THE CASE

- The Department received information on June 8, 1998 that Elmore was involved in an off-duty incident that resulted in a person being wounded in the arm with a .22-caliber pistol.
- On June 9, 1998, the Department placed Elmore on Administrative Leave
 With Pay pending the outcome of the assault allegations against him.
- By Memorandum dated July 1, 1998, the Department placed Elmore on Administrative Leave Without Pay effective July 2, 1998, pending the outcome of the assault allegations against him.
- On July 22, 1998, the Department provided Elmore a post-suspension due process hearing. Deputy Commissioner Colonel Jerry W. Scott served as hearing officer.
- By memorandum dated July 27, 1998, the Department notified Elmore that he would remain on Administrative Leave Without Pay pending the outcome of the investigation into his conduct.
- By Memorandum dated August 17, 1998, Deputy Commissioner Scott recommended that Elmore be terminated based upon the June 7, 1998

incident.

- On August 28, 1998, Deputy Commissioner Scott conducted a minimum due process hearing for Elmore based upon Scott's own recommendation for termination.
- 8. By memorandum dated September 3, 1998, Department of Safety Commissioner Mike Greene decided to terminate Elmore effective September 13, 1998 for gross misconduct or conduct unbecoming a state employee, conduct endangering the lives and property of others, conduct seriously disrupting the normal operations of the Department, and for the good of the service.
- On October 8, 1998, Kent Eldridge, Director of Support Services conducted Elmore's Step IV grievance hearing appealing his termination.
- By Memorandum dated October 13, 1998, Commissioner Mike Greene informed Elmore that he was upholding his decision to terminate Elmore.
- On October 7 and 8, 1999, Administrative Law Judge ("ALJ") Marion
 Wall, sitting for the Civil Service Commission, conducted Elmore's Step
 V grievance hearing.
- 12. On December 21, 1999, ALJ Wall entered his Initial Order. The ALJ concluded that the Department had not proved Elmore guilty of gross misconduct or conduct unbecoming a state employee, conduct endangering the lives and property of others, or conduct seriously disrupting the normal operations of the Department. The Order set aside Elmore's termination and awarded him back pay, benefits and attorney's fees.
- 13. The Department appealed the Initial Order to the Civil Service Commission ("Commission"). The Final Order rendered by the Commission on June 22, 2000 found that Elmore engaged in conduct unbecoming a State employee. The Commission ordered Elmore

reinstated subject to a 90-day suspension period without pay, a 90-day probationary period, and instructed that Elmore not be assigned to work in Cumberland County, Tennessee, but was otherwise to be assigned to his original work district. The Final Order awarded Elmore back pay, benefits and attorneys' fees.

- 14. The Department petitioned the Commission for a stay and reconsideration of the Final Order, which was denied on July 25, 2000.
- 15. On July 26, 2000, the Department filed a petition for judicial review of the Commission's Final Order with the Davidson County Chancery Court. The Department also moved for a stay of enforcement of the Final Order pending the outcome of judicial review.
- 16. On August 18, 2000, the Chancellor heard the motion for stay and the motions filed by Elmore to dismiss the petition for judicial review and to compensate his attorney at a rate of \$150 per hour.
- 17. By Order of the Court dated August 24, 2000, the Chancellor stayed enforcement of the Final Order regarding the awarding of back pay, benefits and attorneys' fees, pending the outcome of judicial review. However, the Chancellor ordered Elmore reinstated in accordance with the Final Order pending the outcome of judicial review. Elmore's motion to dismiss was denied, and his motion regarding attorneys' fees was held in abeyance pending the outcome of judicial review.

STANDARD OF REVIEW

The standard of judicial review of administrative actions is set forth in T.C.A. § 4-5-322, which provides as follows:

(h) the court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

T.C.A. § 4-5-322(h).

The Department had the burden of proving its case for Elmore's termination in the administrative proceeding before the Commission. As long as there is substantial and material evidence supporting the Commission's decision that the Department did not meet its burden of proof, and as long as the Commission's decision was not arbitrary and capricious, the Commission's decision not to uphold the termination must stand. T.C.A. § 4-5-322(h).

A decision is supported by substantial and material evidence if the record of the proceedings contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion." Clay County Manor v. State Dept. Of Health and Environment, 849 S.W.2d 755, 759 (Tenn. 1993). The decision need not be supported by a preponderance of the evidence. Street v. State Board of Equalization, 812 S.W.2d 583, 585-586 (Tenn. App. 1990). The evidence will be deemed sufficient if it furnishes a reasonably sound basis for the decision being reviewed. Wayne County v. Tennessee Solid waste Disposal Control Board, 756 S.W.2d 274, 279 (Tenn. App. 1988). The Court may not reweigh the evidence in making its determination. Humana of Tennessee v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667 (Tenn. 1977). The Commission's action is arbitrary and capricious if it is not based on any course of reasoning, or exercise of judgment, or if there is a clear error in judgment. Jackson Mobilphone Company v. Tennessee Public Service Comm'n, 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993).

ANALYSIS

The Commission held that the Department had not met its burden of proof in showing that Elmore engaged in gross misconduct, conduct seriously disrupting the functioning of the agency or department, or conduct endangering the lives and property of others. The Commission did find, however, that Elmore's conduct constituted conduct unbecoming a state employee, specifically a state law enforcement officer. The Commission further held that Elmore's conduct did not warrant a termination of his employment and that such termination was not necessary for "the good of the service."

First, the Department contends that the Commission erred in finding that Elmore's conduct did not constitute gross misconduct, conduct seriously disrupting the functioning of the Department, or conduct endangering the lives and property of others.

During oral argument, counsel for the Department cited Volume VII, page 46 of the Technical Record as proof that the Commission had found the Department met its burden on these charges, but that this conclusion had somehow failed to appear in the final order. The Court has reviewed the transcript and finds this argument to be unfounded. On Page 47 of Volume VII, the three Commission members agreed by voice vote that Elmore was guilty solely of conduct unbecoming a state employee. Accordingly, this argument must fail.

Second, the Department argues that the Commission's decision is unsupported by substantial and material evidence. In its Final Order, the Commission adopted the findings of fact made by the ALJ in his Initial Order. In that Order, the ALJ found that "both [Smith and Elmore] agreed that Smith went for the gun, and that it was in his hand when it went off in a struggle over the gun." He also stated that he "carefully scrutinized the demeanor of the witnesses at the hearing" and found that the testimony of Kendall Smith was not credible. Additionally, he found that Kendall Smith "stopped the truck, he reached for the gun, and he lied not once but several times as to what happened immediately after the incident." "All in all," stated the ALJ, "it cannot

be concluded that the facts were as the State urges, even by a preponderance of the evidence standard."

The Department cites to the factual record, contending that various aspects of the altercation between Elmore and Smith prove that Elmore's conduct constituted gross misconduct, conduct seriously disrupting the functioning of the Department, or conduct endangering the lives and property of others. The Department argues that key facts, e.g., the entire altercation occurred within the cab of Smith's truck, Elmore bore ill will towards Smith, after the altercation Elmore mailed a letter of apology to Smith, etc., militate in favor of a finding that Elmore was guilty of the above charges. When reviewing the evidentiary foundation of an administrative decision under T.C.A. § 4-5-322(h)(5), this Court is not permitted to weigh factual evidence and substitute its own conclusions and judgment for that of the agency, even if the evidence could support a different determination than the agency reached. Ware v. Greene, 984 S.W.2d 610, 614 (Tenn. App. 1998); see also Humana of Tenn. v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667 (Tenn. 1977). An agency's decision may be supported by substantial and material evidence even when the evidence could support another conclusion. Jones v. Greene, 946 S.W.2d 817, 828 (Tenn. Ct. App. 1996). The courts need only reject an agency's factual findings when, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion. Id.

After reviewing the entire record, the Court finds there is substantial and material evidence to support the Commission's decision, and finds no clear error in judgment that would serve to negate this decision.

Third, the Department argues that, having found Elmore's conduct constituted conduct unbecoming a state employee, the Commission should have affirmed Elmore's termination.

The Department cites Department of Personnel Rule 1120-10-.02 in support of its argument. The rule states as follows:

1120-10-.02 Policy. A career employee may be warned, suspended, demoted or dismissed by his appointing authority whenever just or legal cause exists. The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this Rule and the Act...

Tennessee law provides for grievance hearings so that an employee may challenge disciplinary actions taken pursuant to the above policy. In this case, the Commissioner of the Department of Safety found Elmore guilty of gross misconduct or conduct unbecoming a state employee, conduct endangering the lives and property of others, conduct seriously disrupting the normal operations of the Department and for the good of the service. This decision was subject to review by the Civil Service Commission and a hearing was conducted by the ALJ sitting for the Commission. As stated above, the ALJ set aside Elmore's termination in his Initial Order, finding that the Department of Safety had not met its burden of proof on the above charges. In the appeal which followed, the Commission adopted the ALJ's findings of fact and conclusions of law, with the exception that it found Elmore guilty of conduct unbecoming a State employee.

The Department contends that, having found Elmore guilty of the least of the charges against him, the Commission should have imposed the same punishment that the Commissioner of Safety imposed on him for multiple offenses. In support of this argument, the Department relies upon *Gross v. Sheriff A.C. Gilless, Jr.*, 26 S.W.3d 488 (Tenn. Ct. App. 1999). In *Gross*, the Tennessee Court of Appeals upheld the termination of a Memphis deputy sheriff for unbecoming conduct, concluding that the deputy's poor judgment subjected the Shelby County Sheriff's Department to adverse publicity detrimental to the public interest.

There is a key difference between the *Gross* case and the case at bar. In *Gross*, the trial court reviewed the decision of the Shelby County Civil Service Merit Board and reversed the Board's decision to terminate an employee. The Court of Appeals held that, contrary to the trial court's ruling, there was material evidence to support the Board's findings, so the Board's decision to terminate Gross should have

been upheld. The Appeals Court stated that it would not "second guess" the administrative agency's decision, even though the decision to terminate seemed harsh. In the present case, this Court is reviewing the decision of the Commission, not the decision of the Commissioner of Safety. There is material evidence in the record to support the Commission's findings. Accordingly, the Court declines to "second guess" the Commission's ruling that Elmore should be reinstated.

Fourth, the Department contends that the Commission erred in not upholding Elmore's termination "for the good of the service," stating that the Commissioner of Safety had just cause to terminate Elmore due to the publicity generated by the incident in question and the fact that Elmore was indicted by a grand jury and found guilty of assault.

T.C.A. § 8-30-326 provides that an appointing authority may dismiss an employee when he/she considers that the good of the service will be served thereby. Tennessee caselaw instructs that in some cases, where a public employee's efficiency or usefulness in his position has been seriously impaired - whether through his own fault, the fault of others, or blameless misfortune - the good of the service requires that the employee be discharged. Reece v. Tennessee Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985), cert denied, 475 U.S. 1019, 106 S.Ct. 1207, 89 L.Ed.2d 319 (1986). In Reece, the Tennessee Court of Appeals upheld the dismissal of a correctional officer for the good of the service, even though the employee was discharged without proof of misconduct regarding the employee's arrest on charges of manufacturing marijuana. The officer was employed as a correction sergeant, and required to supervise an entire shift of security personnel. In the absence of his lieutenant twice a week, he was also in charge of the entire Bledsoe Regional Prison, which had approximately 630 inmates, and 200 to 250 employees. The Court noted that the employee's arrest received considerable publicity in the "small county of Bledsoe and small community of Pikeville where [the employee] lived and worked," and that news of the arrest and

charges against him was readily available to inmates and other employees via the media. There was evidence from the warden of the facility that, given the officer's position of trust, which encompassed the attitude of inmates, attitude of subordinates, and trust from superiors, a "cloud" remained over the officer, impairing his ability to supervise.

The facts in the present case do not suggest the kind of job impairment found by the Court of Appeals in *Reece*. Elmore did not supervise hundreds of inmates and subordinate employees in the security-sensitive confines of a correctional facility. As a criminal investigator with the Tennessee Highway Patrol, his work area encompassed Fentress, Overton, Clay and Pickett Counties. Although the shooting incident involving Elmore received considerable publicity through radio and newspaper media in the Cumberland County community, Elmore's supervisor testified that this publicity would compromise his ability to work in Cumberland County, but not in other locations. The facts in *Reece* are distinguishable from the facts in the present case. Accordingly, this Court upholds the Commission's decision that Elmore's termination is not necessary for the good of the service.

Fifth, the Department asserts that the Commissioner of the Department of Safety was not obligated to render the same degree and kind of disciplinary action against Elmore as in a previous case where an employee was found guilty of assault. The Department further contends that the ALJ abused his discretion by taking this earlier case into account. The record reflects that in the earlier case, a Trooper Marsh was found guilty of assault after "threatening someone, and chasing him or her in a state patrol car." The Commissioner subsequently imposed a five-day suspension and ordered the officer to move from the county where the assault took place.

The record does not reflect all of the facts of the Marsh incident, nor is it necessary for this Court to engage in an in-depth analysis on why there was such great disparity in the disciplinary actions imposed. The ALJ, and subsequently, the Commission, was justified in looking to other disciplinary actions handed down by the

Commissioner of Safety in gauging the appropriateness of the sanction imposed on Elmore. In *Gross, supra*, the Tennessee Court of Appeals stated that it took such decisions into account in its analysis, stating that "[w]e note that the record contains no evidence to suggest that the Board lacked authority to impose [the punishment at issue] or that the Board treated Gross any differently than it has treated other officers found to have engaged in unbecoming conduct." *Gross* at 495. This Court also notes that, while the Department asserts that the Marsh incident involved only a "verbal exchange," an assault involving a state patrol car could be viewed as an extremely serious, perhaps terminable, offense, whether or not injury resulted. The Court finds that the Commission did not abuse its discretion by taking note of previous disciplinary actions taken by the Commissioner.

Sixth, the Department contends that the Commission abused its discretion and violated statutory provisions in ordering Elmore reinstated subject to a 90-day suspension period without pay and 90-day probationary period. In regard to the 90-day suspension imposed by the Commission, the Department cites T.C.A. § 8-30-325 in support of its argument. This statute provides that

[a]n appointing authority may suspend without pay a regular employee, for disciplinary purposes, for such length of time as the authority considers appropriate, not exceeding thirty (30) days in any twelve-month period. With the approval of the commissioner, a regular employee may be suspended for a longer period pending the investigation or trial of any charges against such employee.

By its own terms, the above statute applies to the appointing authority. It does not purport to delineate the actions available to the Commission when it determines that dismissal of an employee is too harsh a disciplinary action. Accordingly, this argument must fail.

As to whether the Commission abused its discretion in imposing a 90-day probationary period, the Department contends that Department of Personnel Rule 1120-2-.11 supports its position that the Commission was without authority to impose a probationary period in this case. The aforementioned rule does not purport to address

probationary periods imposed for disciplinary purposes, but instead deals with the prerequisites necessary for a new employee to attain career status in a particular job classification. The General Assembly vested the Civil Service Commission with the power and jurisdiction to have the final word regarding the discipline and termination of Civil Service Employees. *Tennessee Dept. of Mental Health and Mental Retardation v. Allison*, 833 S.W.2d 82, 85 (Tenn. Ct. App. 1992). The Court finds that the Commission acted within its discretion in imposing a 90-day probationary period as a condition of Elmore's reinstatement.

Seventh, the Department argues that the Commission abused its discretion in ordering Elmore reassigned to his prior work district with the exclusion of Cumberland County, Tennessee.

The record shows that publicity of the shooting incident involving Elmore was highly publicized in Cumberland County. His supervisor testified that this publicity might compromise Elmore's ability to work in that locale, but not in other counties. Accordingly, the Commission ruled that Elmore should not be assigned to Cumberland County. From the record, it appears that Elmore's work area at the time he was placed on administrative leave encompassed Fentress, Overton, Clay and Pickett Counties, but not Cumberland County. Therefore, the Commission's ruling serves to limit only possible future assignments. However, the Department argues that Department of Safety General Order 215-2 requires all commissioned officers to reside within their assigned duty areas, so that the Commission's ruling would violate Departmental policy. However, General Order 215-2 also provides that the Commissioner or his designate are free to grant exceptions to this policy. It appears that such an exception was made in Elmore's case, as he resided in Cumberland County but was not assigned there at the time he was placed on administrative leave.

At oral argument, the Department raised a scenario where an emergency situation arises in Cumberland County, placing Elmore in a situation where he could be

disciplined for offering assistance. The Court finds this argument unpersuasive. The restriction on being assigned to Cumberland county would arguably place Elmore in the same situation as any officer present at the scene of an emergency in a locale to which he is not assigned. Accordingly, the Court finds that the restriction on working in Cumberland County was within the Commission's discretion.

Last, the Department contends that Elmore should not be awarded attorneys' fees since he did not prevail in every aspect of his appeal. T.C.A. § 8-30-328(f) provides that "[t]he commissioner may, in its discretion, award attorney's fees and costs to a successfully appealing employee." The Department argues that because Elmore was found to have engaged in conduct unbecoming to a State employee and was not totally exonerated in this matter, he was not a "successfully appealing employee." In support of this proposition, the Department cites Norris v. Boynton and Tennessee Civil Service Commission, No. 89-50-II, 1989 WL 97958 (Tenn. Ct. App. August 25, 1989). In Boynton, the Civil Service Commission found that the Department of Correction had properly terminated an employee during his arrest and trial. Despite this finding, the Commission awarded the employee back pay from the date of his termination, along with attorney's fees. The trial court upheld the Commission's ruling, but the Court of Appeals ruled that T.C.A. § 8-30-328(f) precluded an award of back pay and attorney's fees, since the employee's termination had been upheld by the Commission. In the present case, Elmore appealed his termination of employment. The Commission concluded that Elmore should not have been terminated and ordered him reinstated. When it overturned Elmore's termination, the Commission had discretion to award back pay and attorney's fees, and did so. The fees were properly awarded and the Department's argument fails.

The Court notes that Elmore withdrew his request to increase the hourly rate of his attorney's fees from \$85 to \$150. This request therefore need not be addressed.

For the above stated reasons, and after thorough consideration of the briefs, arguments of counsel, statutes, rules, regulations, relevant caselaw and the entire record in this matter, the Court hereby upholds the Final Order of the Commission in its entirety. Elmore is hereby awarded back pay and attorney's fees consistent with that Order. This action shall be remanded to the Commission for proper calculation of back pay and attorney's fees. Costs are taxed to the Department of Safety.

It is so ORDERED.

CAROL L. MCCO

Franklin D. Brabson Attorney at Law 2601 Hillsboro Road, #05 Nashville, Tennessee 37212

Gerry Crownover Attorney at Law 1150 Foster Avenue Nashville, Tennessee 37249-1000





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►Qualls v. **Camp**Tenn.Ct.App.,**2007**.
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
James Lester QUALLS
v.
Randy CAMP, et al.
No. M2005-02822-COA-R3-CV.

June 29, **2007** Session. July 23, **2007**.

Appeal from the Chancery Court for Davidson County, No. 03-2108-IV; Richard H. Dinkins, Chancellor.

Robert E. Cooper, Jr., Attorney General and Reporter, and Eugenie B. Whitesell, Senior Counsel, for the Appellants, Randy Camp, in his official capacity as Commissioner of Personnel and Executive Secretary of the Civil Service Commission, and Quentin White, in his official capacity as Commissioner of the Tennessee Department of Correction.

<u>Larry D. Woods</u>, Nashville, **Tennessee**, for the Appellee, James Lester **Qualls**.

<u>SHARON G. LEE</u>, J., delivered the opinion of the court, in which <u>HERSCHEL P. FRANKS</u>, P.J., and <u>D. MICHAEL SWINEY</u>, J., joined.

OPINION

SHARON G. LEE, J.

*1 In this action brought under the Administrative Procedures Act, an employee of the Department of Corrections filed a grievance challenging the discipline imposed upon him for an employment infraction as unwarranted and unduly severe. The Civil Service Commission, reviewing the Administrative Law Judge's decision, entered an order containing no findings of fact, conclusions of law, or policy reasons supporting its decision, and upon the employee's appeal to the Chancery Court, the Chancellor remanded the case to the Commission with

instructions to enter an order in compliance with <u>Tenn.Code Ann. § 4-5-314</u>. The sole issue on appeal is whether the Chancery Court erred in awarding the employee an attorney's fee of \$14,920 pursuant to <u>42 U.S.C. § 1988</u>. Finding no abuse of discretion, we affirm the judgment of the trial court.

I. Background

This is the second time this case has been appealed. The pertinent factual and procedural background is provided by our opinion in the first appeal, *Qualls v. Camp*, No. M2004-01005-COA-R3-CV, 2005 WL 2861585 (Tenn.Ct.App.M.S., Oct. 27, 2005) ("*Qualls* I") FNI, and we quote from the *Qualls* I opinion in the following recitation of the relevant facts.

<u>FN1.</u> In *Qualls* I, this court dismissed the appeal for lack of subject matter jurisdiction due to the absence of a final judgment.

In August 2001, the Tennessee Department of Correction ("the Department") disciplined Petitioner, Lt. James Lester **Qualls** ("Lt.Qualls") for gross misconduct stemming from the alleged falsification of official document relating to firearms qualifications. The Department demoted Lt. Qualls from lieutenant to correctional sergeant and transferred him from the Turney Center Industrial Prison in Only, Tennessee, where he had worked for twenty-seven years, to the Tennessee Prison for Women in Nashville, Tennessee. The Commissioner of Correction reviewed the matter and further demoted Lt. Qualls to the rank of correctional officer and transferred him to Wayne County Boot Camp in Clifton, Tennessee. Qualls I, 2005 WL 2861585, at *1. Lt. Qualls filed a grievance challenging the discipline imposed upon him, arguing, among other things, that it was unwarranted and excessive.

In September 2002, the matter was heard by an administrative law judge ("ALJ"), who set aside the disciplinary measures. In its detailed order, the ALJ determined that (1) although Lt. Qualls had committed misconduct, the misconduct was not gross misconduct under Rule 1120-1-.01(45) of the Rules of the Department of Personnel; (2) the Department had

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failed to follow the civil service progressive discipline system as set forth in <u>Tenn.Code Ann. § 8-3-330</u>; (3) that the Department had failed to consider Lt. Qualls' past conduct and excellent work record and the extenuating circumstances surrounding the

past conduct and excellent work record and the extenuating circumstances surrounding the misconduct; and (4) that the Department did not follow the discipline imposed on another employee who had committed essentially the same offense. The Department appealed to the Civil Service Commission ("the Commission"), which heard the matter in June 2003. In a very brief order that contained no factual findings, conclusions of law, or policy reasons supporting its decision, the Commission overturned the decision of the ALJ and ordered Lt. Qualls be demoted from lieutenant to sergeant. *Id*.

*2 Lt. Qualls filed an appeal of the Commission's determination in the Davidson County Chancery Court in July 2003. In his petition, Lt. Qualls asserted that the Commission's actions were arbitrary, capricious, abusive, and unsupported by material and substantial evidence. Lt. Qualls also asserted that the Department had failed to follow statutory requirements regarding progressive discipline. In his original petition to the chancery court, Lt. Qualls prayed for reinstatement, back pay, benefits, and reasonable attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988, et seq. In October 2003, he amended his petition to include an assertion that the Commission had failed to comply with Tenn.Code Ann. §§ 4-5-314, 4-5-315, and 8-30-328. Id.

The Chancery Court found the Commission had failed to include conclusions of law and policy reasons for its decision as required by <u>Tenn.Code Ann. § 4-5-314</u>. FN2 The trial court held that it was therefore unable to review the matter in accordance with <u>Tenn.Code Ann. § 4-5-322</u>. FN3 It accordingly vacated the Commission's order and remanded the case to the Commission for further proceedings and entry of a final order in compliance with § 4-5-314. *Qualls I*, 2005 WL 2861585, at *2.

<u>FN2.Tenn.Code Ann.</u> § 4-5-314(c) provides as follows:

A final order, initial order or decision under § 50-7-304 shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact,

if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The final order, initial order or decision must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order.

<u>FN3.Tenn.Code Ann.</u> § 4-5-322 provides in relevant part as follows:

- (a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review ...
- (h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
- (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
- (i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded or

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modified by the reviewing court unless for errors that affect the merits of such decision.

On February 4, 2004, Lt. Qualls filed a motion to alter or amend, requesting that the trial court amend its order to include reasonable attorney's fees pursuant to 42 U.S.C. § 1988. Lt. Qualls' attorney submitted fees of \$14,920 based on a rate of \$400 per hour. In their response to Lt. Qualls' motion, the Commission and Department (hereinafter "Respondents") argued that an award of attorney's fees under 42 U.S.C. § 1988 was not appropriate because Lt. Qualls was not a "prevailing party," as required by the statute, where the cause had been remanded for findings. They further asserted that attorney's fees were not warranted under the statute because the trial court had not found a deprivation of rights under color of state law. Respondents also opposed the reasonableness and amount of the requested award. They submitted that the rate of \$400 per hour was unreasonable in that it does not reflect the prevailing market rate for civil rights litigation in Tennessee, and that it was an inappropriate rate for this particular type of case. The trial court found the rate requested to be reasonable and on March 25, 2004, awarded Lt. Qualls attorney's fees of \$14,920 based on an hourly rate of \$400. Id.

Upon remand from the Chancery Court, the Commission reversed itself, voting to uphold and affirm the ALJ's original decision. The Commission's decision upon remand produced the final result that Lt. Qualls was reinstated as a correctional lieutenant at Turney Center and granted back pay, and the discipline ultimately imposed upon him was reduced to a three-day suspension. Respondents did not appeal the Commission's decision on remand to the Chancery Court.

II. Issue Presented

On this appeal, the issue presented is whether the trial court erred in awarding Lt. Qualls his attorney's fee in the amount of \$14,920 based on a rate of \$400 per hour, pursuant to 42 U.S.C. §§ 1993 and 1988.

III. Standard of Review

*3 The attorney fee provision in 42 U.S.C. § 1988 states that a court "in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." See Consolidated Waste Systems, LLC v.

Metropolitan Gov't of Nashville & Davidson County, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *45 (Tenn. Ct.App. M.S., June 30, 2005)."As the language of the statute makes clear, the determination of whether to make an award of fees, as well as the amount of such fees, lies within the discretion of the trial court. A trial court's decision to grant or deny fees is reviewed for abuse of discretion. Fogerty v. MGM Group Holdings Corp., 379 F.3d 348, 357 (6th Cir.2004). That discretion is limited, however, by the requirement that only a prevailing party may qualify for a fee award. Additionally, if it is determined that a party meets the prevailing party requirement, fees should be awarded "unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937 (1983)."Id.Generally, "an award of attorney's fees under Section 1998 will be reversed or altered only if the trial court has abused its discretion." Sunburst Bank v. Patterson, 971 S.W.2d 1, 7 (Tenn.Ct.App.1997).

In <u>Eldridge v. Eldridge</u>, 42 S.W.3d 82, 85 (<u>Tenn.2001</u>), the Tennessee Supreme Court provided the following guidance regarding the abuse of discretion standard:

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." State v. Scott, 33 S.W.3d 746, 752 (Tenn.2000); State v. Gilliland, 22 S.W.3d 266, 273 (Tenn.2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." State v. Shirley, 6 S.W.3d 243, 247 (Tenn.1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn.1998).

An abuse of discretion occurs when the lower court's decision is without a basis in law or fact and is, therefore, arbitrary, illogical, or unconscionable. <u>State v. Brown & Williamson Tobacco Corp.</u>, 18 S.W.3d 186, 191 (Tenn.2000); <u>Denver Area Meat Cutters and Employers Pension Plan v. Clayton</u>, 209 S.W.3d 584, 590 (Tenn.Ct.App.2006).

IV. Analysis

A. Due Process

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The Respondents argue that the award of fees was improper because the trial court did not make a specific finding that Lt. Qualls' civil rights had been violated under color of state law. Section 1983 of the United States Code establishes a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws[.]" Section 1988 of the United States Code provides that a court, in its discretion, may allow the "prevailing party" a reasonable attorney's fee in an action to enforce an action brought under 42 U.S.C. § 1983. Our courts have held that a claimant may couple a petition for judicial review pursuant to the Uniform Administrative Procedures Act, Tenn.Code Ann. § 4-5-101, et seq., with a claim for attorney's fees under §§ 1983 and 1988, as Lt. Qualls did here. Wimley v. Rudolph, 931 S.W.2d 513, 516 (Tenn.1996); Morris v. Correctional Enterprises of Tenn., No. 01-A-01-9612-CH00543, 1997 WL 671988, at *8-9 (Tenn.Ct.App.M.S., Oct. 29, 1997).

*4 It is undisputed that Lt. Qualls, as a non-probationary regular state employee, has a constitutionally protected property right to his employment that cannot be deprived without due process. SeeTenn.Code Ann. § 8-30-331(a)(providing that "Employees who have successfully completed their probationary period have a 'property right' to their positions. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular employee of such employee's 'property right' will become effective until minimum due process is provided"); Armstrong v. Tennessee Dept. of Veterans 959 S.W.2d 595, Affairs, (Tenn.Ct.App.1997)(stating "Tennessee law gives certain civil service employees a constitutionally protected property interest in continued employment which cannot be extinguished unless the employees are afforded procedural due process").

Having determined that Lt. Qualls has a protected property interest in his employment with the state that cannot be deprived without due process, our next inquiry is what process is due him. *Id.*; *Martin v. Sizemore*, 78 S.W.3d 249, 263 (Tenn.Ct.App.2001). As stated by the *Martin* court,

Because due process is a flexible concept, this inquiry is not amenable to one-size-fits-all answers. The extent and nature of the required procedural due process protections depend on the nature and circumstances of the case ...

Procedural due process does not require perfect, error-free governmental decision-making. <u>Mackey v. Montrym, 443 U.S. 1, 13, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979); Eye Clinic, P.C. v. Jackson-Madison County Gen. Hosp., 986 S.W.2d at 578. It does, however, require affording persons like Mr. Martin a relatively level playing field in a contested case hearing. The state should not be permitted to maintain such an unfair strategic advantage that a pall is cast over the fairness of the proceeding.</u>

Id. at 263-64.

<u>Tennessee Code Annotated § 4-5-314</u> sets forth the requirements that an order of the Civil Service Commission, made pursuant to the Uniform Administrative Procedures Act, must follow:

(a) An agency with statutory authority to decide a contested case shall render a final order.

* * *

- (c) A final order ... shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The final order, initial order or decision must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order.
- *5 Notwithstanding these requirements, the order of the Commission in the present case stated as follows in its entirety:

The Civil Service Commission, having completed agency review under the provisions of TCA § 4-5-315, overturns the decision of the Administrative Law Judge with regard to the

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reinstatement of the grievant's position and assignment held previously.

The Commission orders that the Grievant be demoted from the rank of Lieutenant with the Department of Correction to the rank of Sergeant.

As can be seen, the Commission's order contains no factual findings, legal conclusions, nor policy reasons for its decision. Regarding findings of fact, the parties agreed at the hearing before the Chancery Court that the trial court could treat the factual findings of the ALJ as having been adopted by the Commission, which the trial court did, and thus the ALJ's findings of fact became the trial court's as well. The Respondents admitted that the Commission's final order did not comply with the statutory requirements as stated above, but argued that the error was harmless. However, the trial court held that the absence of statutorily required conclusions of law and policy reasons supporting the Commission's decision rendered meaningful review impossible, and remanded the case to the Commission, stating as follows:

Deference to the harmless error standard, however, is more problematic with respect to the statutorily required conclusions of law and policy reasons supporting the Commission's decision. This is particularly true in this case, where the primary issue is the appropriateness of the discipline imposed. The Court should not be left to guess as to the standards, evidence and policies relied upon-or not relied upon-by the Commission and the reasons the Commission chose to impose the discipline it imposed. The basis of the "harmless error" defense is codified at T.C.A. § 4-5-322(i)^{FN4}; and it cannot be said that the failure of the Commission's Final Order to comply with the statute does not affect the merits of the Commission's decision.

FN4.Tenn.Code Ann. § 4-5-322(i) provides that "[n]o agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors that affect the merits of such decision."

* * *

Simply put, the Commission's failure to include conclusions of law and policy reasons for its decision as required by statute renders the Court incapable of reviewing the decision in accordance with T.C.A. § 4-5-322.

Our Supreme Court, construing the similarly-worded predecessor to Tenn.Code Ann. § 4-5-314, has emphasized the importance of compliance with the statutory requirements, describing them as "not a mere technicality but ... an absolute necessity without which judicial review would be impossible." Levy v. State Bd. of Examiners, 553 S.W.2d 909, 911 (Tenn.1977); accord CF Industries v. Tennessee Public Service Comm'n, 599 S.W.2d 536, 541 (Tenn.1980). Under the applicable statutory scheme, Lt. Qualls' due process rights include the right to meaningful review on appeal by the Chancery Court. See Shaw v. Shelby County Gov't., 189 S.W.3d 232, (Tenn.Ct.App.2005)(stating "the most fundamental element of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"); Attea v. Eristoff, No. M2005-02834-COA-R3-CV, 2007 WL 1462206, at *5 (Tenn.Ct.App.M.S., May 18, 2007) (listing "appellate review of administrative determinations by an independent judicial tribunal" as a "key element of due process"). The trial court was correct in determining that requiring the trial court to review an administrative decision unsupported by statutorily required conclusions of law, any discussion regarding the policy reasons or rationales for the decision, or what evidence was considered in reaching the decision, would effectively deprive the parties of a meaningful review process.

*6 Thus, Lt. Qualls has established a deprivation of his due process rights under color of state law. The trial court awarded Lt. Qualls his attorney's fee for time expended in pursuing his § 1983 claim, under 42 U.S.C. § 1988, thereby implicitly finding (and remedying, by remand to the Commission) a due process violation. We find no error in the trial court's decision in this regard, and the fact that the trial court did not explicitly state in its order that it found that Lt. Qualls' civil rights had been violated under color of state law does not change this conclusion. In so holding, we note that "the Tennessee Supreme Court has even upheld an award of attorney's fees under 42 U.S.C.A. § 1988 (1991) even though the plaintiff did not specifically plead or rely on 42 U.S.C. § 1983."Hardcastle v. Harris, 170 S.W.3d 67, 91, n. 31 (Tenn.Ct.App.2004), quoting Bloomingdale's by Mail v. Huddleston, 848 S.W.2d 52, 56 (Tenn.1992); see also Wimley, 931 S.W.2d at 514 (upholding Court of

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Appeals' decision concluding that "<u>Section 1983</u> attorneys' fees may be allowed even though <u>Section 1983</u> is not invoked, if the facts justify").

B. "Prevailing Party" Under 42 U.S.C. § 1988

The Respondents also argue on appeal that Lt. Qualls was not a "prevailing party" such that an award of attorney's fees was warranted under 42 U.S.C. §§ 1993 and 1998. Recently, this court discussed at length the "prevailing party" concept as interpreted and developed by the United States Supreme Court in the case of Consolidated Waste Systems, LLC v. Metropolitan Gov't of Nashville & Davidson County, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct.App. M.S., June 30, 2005). The Consolidated Waste Systems court noted that a plaintiff is a "prevailing party" when actual relief on the merits of his or her claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff, and further stated as follows in relevant part:

The meaning of the term "prevailing party" has been the subject of a number of opinions by the United States Supreme Court. Recently, the Court has indicated that the meaning is relatively clear. In <u>Buckhannon Board and Care Homes, Inc. v. West Virginia Department of Health and Human Resources</u>, 532 U.S. 598, 121 S.Ct. 1835 (2001), the Court ... made it clear that to be a prevailing party, one must receive at least some judicially-sanctioned relief on the merits of his or her claim. 532 U.S. at 600-604, 121 S.Ct. at 1838-40.

Describing "prevailing party" as a term of art, the Court referred to the Black's Law Dictionary definition: "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded ... Also termed successful party."A prevailing party is one who has been awarded some relief by the court. 532 U.S. at 603, 121 S.Ct. at 1839.

* * *

*7 This threshold requirement has long existed. "Only where a party has prevailed on the merits of at least some of his claims ... has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the

expense of his own attorney." Hanrahan v. Hampton, 446 U.S. 754, 758, 100 S.Ct. 1987 (1980). In Hensley, the Court sought to clarify the standard where the plaintiff achieves only limited success. Hensley, 461 U.S. [424] at 431, 103 S.Ct. [1933] at 1938. The Court defined a prevailing party as one who succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Id.

* * *

"[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.... In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar, 506 U.S. [103] at 111-12, 113 S.Ct. [566] at 573. (citations omitted).

Consolidated Waste Systems, LLC, 2005 WL 1541860, at *46-47; C.S.C. v. Knox County Bd. Of Educ., No. E2006-01155-COA-R3-CV, 2007 WL 1519543, at *5-6 (Tenn.Ct.App.E.S., May 25, 2007).

In the instant case, Lt. Qualls ultimately obtained significant success on his grievance challenging his discipline as unwarranted and unduly severe. The final order of the Commission, upholding the ALJ's decision, had the effect of setting aside Lt. Qualls' demotion and transfer to another facility, reinstating him to the position and assignment he held at the time of his infraction, and granting him lost back pay. The Respondents state in their brief that "it should be noted that in this case, upon remand, the Commission chose to affirm the ALJ's decision rather than enter a new final order that complied with Tenn.Code Ann. § 4-5-314(c)," but argue that "to the extent Petitioner received the same remedy he would have received had the Chancery Court reversed the decision instead of remanding it, this result does not raise Petitioner to the status of 'prevailing party' for purposes of an award of attorney's fees under 42 U.S.C. § 1988."We disagree; Lt. Qualls clearly is a "prevailing party" in this litigation.

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In the case of <u>Daron v. Department of Correction</u>, 44 S.W.3d 478 (Tenn.2001), the Supreme Court was recently presented with a factual situation nearly identical to the present one. In Daron, the petitioner was a corrections officer who had been terminated for a violation of DOC policy. Id. at 479. He appealed pursuant to the Tennessee Administrative Procedures Act, and the ALJ found that "although Daron had committed several acts of misconduct, the discipline imposed should be a ten-day suspension rather than termination."Id. The ALJ denied Mr. Daron's claim for attorney's fees, however, and the Commission affirmed the ALJ's decision. The Chancery Court reversed the Commission's ruling denying attorney's fees, and the issue before the Supreme Court in Daron was whether the trial court should have awarded attorney's fees to Mr. Daron as a "successfully appealing employee" under Tenn.Code Ann. § 8-30-328(f). FN5 Id. at 480.

FN5.Tenn.Code Ann. § 8-30-328(f) provides in pertinent part: "The commission may, in its discretion, award attorney's fees and costs to a successfully appealing employee." In this case, Lt. Qualls did not include a claim pursuant to this statute, opting instead to proceed solely under 42 U.S.C. §§ 1983 and 1988 for his claim for attorney's fees.

*8 The Supreme Court held the phrase "successfully appealing employee" analogous to the phrase "prevailing party" under § 1988. The Court further held that Mr. Daron was a successfully appealing employee, and thus vacated the trial court's order refusing to award an attorney's fee, stating:

The purpose of Tenn.Code Ann. § 8-30-328 is to give employees "every opportunity to resolve bona fide complaints or grievances through established procedures." Tenn.Code Ann. § 8-30-328(a)(4). The federal statute [§ 1988] has a similar purpose-to ensure "effective access to the judicial process." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976). To require litigants to succeed on all aspects of their appeal, as the DOC and the Commission suggest, would not only discourage litigants from pursuing their legitimate claims but would also make attorneys reluctant to represent them.

The DOC and the Commission contend that

although the discipline was reduced, Daron is not a "successfully appealing employee" under Tenn.Code Ann. § 8-30-328(f) because he was found guilty of several acts of misconduct. Daron, however, has indeed succeeded on a "significant claim," in that he obtained a reduction in discipline from termination to a ten-day suspension. See Texas State Teachers Ass'n, 489 U.S. at 791, 109 S.Ct. at 1493. The finding that he is guilty of misconduct, therefore, is not conclusive as to whether he fits the category of a "successfully appealing employee."

We conclude that the phrases "prevailing party" and "successfully appealing employee" are analogous and hold that a litigant is a "successfully appealing employee" if the employee succeeds on a "significant claim" which affords the employee a substantial measure of the relief sought. Because Daron appealed the DOC's decision to terminate his employment and the discipline was reduced to a ten-day suspension, Daron is a "successfully appealing employee" under Tenn.Code Ann. § 8-30-328(f).

Daron, 44 S.W.3d at 481.

The facts of the present case are indistinguishable from those in *Daron*. Similarly to the *Daron* Court's conclusion, we conclude that the Petitioner, whose discipline was significantly reduced to a three-day suspension, was a prevailing party.

C. Reasonableness of Attorney's Fee

Even though Lt. Qualls qualifies as a "prevailing party" under the statute, he may not be entitled to an award of attorney's fees if such an award would not be reasonable. Consolidated Waste Systems, 2005 WL 1541860, at *49; C.S.C., 2007 WL 1519543, at *7."The nature of relief obtained is relevant to the amount of fees awarded and to the exercise of discretion by the trial court in determining that amount. Farrar, 506 U.S. at 114, 113 S.Ct. at 574. That is because the court must consider the relationship between the extent of success and the amount of the fee award. Hensley, 461 U.S. at 438, 103 S.Ct. at 1942. The degree of overall success is an important, or even the most critical, factor in determining the reasonableness of a fee award. Id.; Texas Teachers Ass'n., 489 U.S. at 793, 109 S.Ct. at 1493-94; Hensley, 461 U.S. at 436, 103 S.Ct. at

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1941."Id.

*9 The trial court approved an award of \$14,920 in fees based on 37.3 hours at a rate of \$400 per hour. In support of his claim for attorney's fees, Lt. Qualls submitted the affidavit of his attorney, Larry Woods, and the affidavits of two other attorneys that the trial court noted were "long time practitioners in the Nashville community," all attesting that the fee requested was reasonable under the circumstances. In opposition, the Respondents filed the affidavit of Lucy Honey Haynes, the Associate Chief Deputy Attorney General, who attested that the \$400 per hour rate was unreasonable and excessive.

In its memorandum opinion, the trial court set forth detailed findings regarding the applicable factors provided in Rule 1.5 of the Tennessee Rules of Professional Conduct, which provides guidance to a court in determining whether an attorney's fee is reasonable. The trial court correctly considered (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the fee customarily charged in the locality for similar legal services; (3) the experience, reputation, and ability of Lt. Qualls' counsel; and (4) the amount involved and the results obtained. The trial court found, among other things, that 37.3 hours billed on this matter was a reasonable amount, and that "a lawyer of less skill and ability than Mr. Woods would undoubtedly have spent more time" on the matter. The court further found that the \$400 hourly fee was Mr. Woods' usual and customary rate, and was within the prevailing market rate for legal services for an attorney of Mr. Woods' considerable experience and reputation. Finally, the court noted that Mr. Woods obtained significant success for Lt. Qualls in the litigation.

In *Consolidated Waste Systems*, this court noted the trial court's broad discretion in awarding attorney's fees, and the reasons for affording that broad discretion, as follows:

A trial court has broad discretion in deciding whether to award fees to a prevailing party and the amount of fees that are reasonable. "It is central to the awarding of fees under § 1988 that the district judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case." Blanchard v. Bergeron, 489 U.S. 87, 96, 109 S.Ct. 939, 946 (1989). The trial

court is usually in the best position to make fee award decisions because it has more closely observed and gained a greater understanding of the litigation, the lawyering, and the results. *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1491."The [trial] court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that lawyering has achieved." *Wilcox*, 42 F.3d at 555.

2005 WL 1541860, at *50; accord <u>C.S.C.</u>, 2007 WL 1519543, at *8. We hold that the award of attorney's fees in this case was a reasonable exercise of the trial court's discretion, considering the totality of the litigation and applicable authorities.

V. Conclusion

*10 For the aforementioned reasons, the judgment of the trial court awarding Lt. Qualls his attorney's fee in the amount of \$14,920, pursuant to 42 U.S.C. §§ 1983 and 1988, is affirmed. Costs on appeal are assessed to the Appellants, Randy Camp, in his official capacity as Commissioner of Personnel and Executive Secretary of the Civil Service Commission, and Quentin White, in his official capacity as Commissioner of the Tennessee Department of Correction.

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